Yvonne Wong Yee Woon v Wong Yee Mei @ Cynthia (as administrator for the estate of Wong Poi Fong @ Wong Swee Fong, deceased) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-642–05 OF 2020
MOHD ARIEF JC
11 APRIL 2022

Succession — Administrator — Removal of administrator — Administrator treated deceased's estate as her personal property, wantonly disbursing monies belonging to estate for unauthorised purposes, favouring certain beneficiaries over others, refusing to provide beneficiaries with any information or accounts of the estate and ignoring terms of the deceased's will, court orders and her duties as administrator — Whether situation warranted removal of administrator and appointment of a new one — Whether errant administrator had to personally pay back to estate monies she had wrongfully disbursed out

The defendant was the court-appointed administrator of the estate of her father, a businessman, who died leaving a Will. The defendant had a strained relationship with the plaintiff who was her sister. The plaintiff alleged that the defendant had grossly mismanaged the administration of the estate by, inter alia, squandering the funds of the estate on unnecessary matters, favouring certain beneficiaries over others in the matter of making payments and refusing to provide the beneficiaries with an account of how the administration of the estate was progressing or how the funds were being managed. In the instant originating summons ('OS'), the plaintiff sought, inter alia, for: (a) an account or inquiry to be ordered to determine the total sum of money the defendant had wrongfully paid out from the estate and that she be ordered to refund the same to the estate; and (b) the defendant be ordered to pay the plaintiff the amounts that were rightfully due and payable to her as a beneficiary in the estate.

Held, (a) removing the defendant as administrator of the estate and appointing, in her place, Amanah Raya Bhd ('ARB') as the new administrator with will annexed; (b) ordering the defendant to surrender to ARB all documents relating to the administration of the estate; (c) ordering the defendant, in her personal capacity, to pay RM2,161,162.41 to the estate; and (d) allowing the plaintiff liberty to apply for further orders if the aforesaid orders were not complied with:

(1) The evidence showed that the defendant had wrongly expended RM2,161,162.41 from the deceased's estate for various purposes. The

estate should not have incurred this expense unless the beneficiaries had unanimously agreed to it. The monies expended were not part and parcel of the estate's obligation. The defendant should have complied with the law, called in the assets of the deceased and paid off the debts of the estate. She should not have incurred any expenses beyond what was provided in law. She did not have absolute discretion and she had forgotten or disregarded the requirements of complying with the terms of the will. For example, it was not the duty of the estate to pay loans to the Pekeliling service station, or the medical bills of the deceased's wife or the fees of the domestic maid and her travelling expenses. The defendant should also not have advanced monies solely to Eric Wong or paid for Eric Wong's funeral expenses. All these were beyond the scope of the terms of the deceased's will and beyond the appropriate scope of the administration of the estate. Accordingly, the defendant was ordered to pay the RM2,161,162.41 back to the estate (see paras 55–56 & 96).

(2) The law expected an administrator to provide information pertaining to the administration of the estate to the beneficiaries. This included rendering a complete and accurate statement of the accounts with the necessary documentation to justify his/her actions as a trustee. In the present case, the defendant had ignored the plaintiff's repeated requests to be apprised of the accounts of the estate. The defendant had also wrongfully favoured certain beneficiaries by making distributions to them and their next-of-kin whilst paying nothing to the plaintiff (who was a 1/6 beneficiary in the estate) because she had a strained relationship with her. The defendant had not administered the estate in accordance with the terms of the will but solely according to her personal views, bias and personal grievances against the plaintiff (see paras 50–51, 59 & 62–63).

(3) The defendant had not been candid when testifying at the trial. She repeatedly refused to answer questions put to her by plaintiff's counsel and even by the court. She was evasive and her answers were short of the truth. She failed to provide documents as requested by the plaintiff and pursuant to the orders of the court especially the original copies of documents in which she claimed the beneficiaries had agreed with all the expenses that she had incurred. The defendant was not a credible witness and her actions fell short of what would have been expected of a trustee/administrator acting in accordance with her duties in law (see paras 64–69).

(4) It was inappropriate for the court to decide what amount should be paid by the defendant, as administrator, to the plaintiff. That should be done based on a full investigation as to the assets and liabilities of the estate and the amount that should be distributed to the beneficiaries based on the terms of the will. Despite the existence of the cash book prepared and

disclosed, since there was lack of probity on the defendant's part, a further reconciliation of the estate's accounts had to be undertaken before any order for payment to the beneficiaries was made (see paras 86–87).

(5) The defendant had acted as if the deceased's estate was under her own personal dominion and she was entitled to disregard the decisions of the courts, the terms of the will and the applicable law. Monies of the estate had been disbursed without justification and the rights of beneficiaries and the orders made by the court had been ignored. If the defendant continued to administer the estate, it would remain unresolved and the parties would continue to bicker and dispute endlessly giving rise to further litigation that was not in the best interests of the estate and the beneficiaries. There was therefore sufficient cause for this court, guided by s 34 of the Probate and Administration Act 1959 and s 40 of the Trustees Act 1949, to remove the defendant as administrator of the estate and appoint a new administrator in her place (see paras 88 & 91–93).

[Bahasa Malaysia summary

Defendan adalah pentadbir yang dilantik oleh mahkamah bagi harta pusaka bapanya, seorang ahli perniagaan, yang meninggal dunia dengan meninggalkan wasiat. Defendan mempunyai hubungan yang tegang dengan plaintif yang merupakan kakaknya. Plaintif mendakwa bahawa defendan telah salah urus pentadbiran harta pusaka dengan, antara lain, membazirkan dana harta pusaka untuk perkara yang tidak perlu, mengutamakan benefisiari tertentu berbanding yang lain dalam urusan membuat pembayaran dan enggan memberikan benefisiari akaun bagaimana pentadbiran harta pusaka dilaksanakan atau bagaimana dana diuruskan. Dalam saman pemula semasa ('OS'), plaintif memohon, antara lain, untuk: (a) suatu akaun atau siasatan diperintahkan untuk menentukan jumlah wang yang telah dibayar oleh defendan secara salah daripada harta pusaka dan beliau diperintahkan untuk memulangkan wang yang sama kepada harta pusaka tersebut; dan (b) defendan diperintahkan untuk membayar plaintif amaun yang sepatutnya perlu dibayar dan harus dibayar kepadanya sebagai benefisiari dalam harta pusaka tersebut.

Diputuskan, (a) memecat defendan sebagai pentadbir harta pusaka dan melantik, menggantikannya, Amanah Raya Bhd ('ARB') sebagai pentadbir baharu dengan wasiat dilampirkan; (b) memerintahkan defendan menyerahkan kepada ARB kesemua dokumen yang berkaitan dengan pentadbiran harta pusaka; (c) memerintahkan defendan, atas kapasiti peribadinya, membayar RM2,161,162.41 kepada harta pusaka; dan (d) membenarkan plaintif kebebasan untuk memohon perintah selanjutnya jika perintah yang disebut di atas tidak dipatuhi:

(1) Keterangan menunjukkan defendan telah secara salah membelanjakan RM2,161,162.41 daripada harta pusaka si mati untuk pelbagai tujuan. Harta pusaka tidak sepatutnya menanggung perbelanjaan ini melainkan

penerima telah sebulat suara bersetuju dengannya. Wang yang dibelanjakan bukanlah sebahagian daripada kewajipan harta pusaka. Defendan sepatutnya mematuhi undang-undang, menyimpan aset si mati dan membayar hutang harta pusaka. Beliau tidak sepatutnya mengeluarkan apa-apa perbelanjaan melebihi apa yang diperuntukkan dalam undang-undang. Beliau tidak mempunyai budi bicara mutlak dan beliau telah melupakan atau mengabaikan keperluan untuk mematuhi syarat-syarat wasiat. Sebagai contoh, tidak menjadi kewajipan harta pusaka untuk membayar pinjaman kepada stesen servis Pekeliling, atau bil perubatan isteri si mati atau yuran pembantu rumah dan perbelanjaan perjalanannya. Defendan juga tidak sepatutnya meminjamlan wang semata-mata kepada Eric Wong atau membayar perbelanjaan pengebumian Eric Wong. Semua ini adalah di luar skop terma wasiat si mati dan di luar skop pentadbiran harta pusaka yang sesuai. Sehubungan itu, defendan telah diperintahkan untuk membayar semula RM2,161,162.41 kepada harta pusaka (lihat perenggan 55–56 & 96).

(2) Undang-undang mengharapkan seorang pentadbir memberikan maklumat berkaitan pentadbiran harta pusaka kepada benefisiari. Ini termasuk memberikan penyata akaun yang lengkap dan tepat dengan dokumentasi yang diperlukan untuk mewajarkan tindakannya sebagai pemegang amanah. Dalam kes semasa, defendan telah mengabaikan permintaan berulang plaintif untuk dimaklumkan mengenai akaun harta pusaka. Defendan juga secara salah memihak kepada benefisiari tertentu dengan membuat pengagihan kepada mereka dan waris mereka sambil tidak membayar apa-apa kepada plaintif (yang merupakan benefisiari 1/6 dalam harta pusaka) kerana beliau mempunyai hubungan yang tegang dengannya. Defendan tidak mentadbir harta pusaka mengikut terma wasiat tetapi semata-mata mengikut pandangan peribadi, berat sebelah dan rungutan peribadinya terhadap plaintif (lihat perenggan 50–51, 59 & 62–63).

(3) Defendan tidak berterus terang semasa memberi keterangan semasa perbicaraan. Beliau berulang kali enggan menjawab soalan yang dikemukakan oleh peguam plaintif dan juga oleh mahkamah. Beliau mengelak dan jawapannya kurang daripada kebenaran. Beliau gagal mengemukakan dokumen seperti yang diminta oleh plaintif dan menurut perintah mahkamah terutamanya salinan asal dokumen di mana beliau mendakwa benefisiari telah bersetuju dengan semua perbelanjaan yang telah ditanggungnya. Defendan bukan saksi yang boleh dipercayai dan tindakannya tidak mencapai apa yang diharapkan daripada pemegang amanah/pentadbir yang bertindak mengikut kewajipannya dalam undang-undang (lihat perenggan 64–69).

(4) Ia adalah tidak wajar untuk mahkamah bagi memutuskan jumlah yang perlu dibayar oleh defendan, sebagai pentadbir, kepada plaintif. Ianya

harus dilakukan berdasarkan siasatan penuh tentang aset dan liabiliti harta pusaka dan jumlah yang harus diagihkan kepada benefisiari berdasarkan syarat wasiat. Walaupun terdapat buku tunai yang disediakan dan didedahkan, memandangkan terdapat kekurangan kewajaran di pihak defendan, penyelarasan lanjut akaun harta pusaka perlu dilakukan sebelum sebarang perintah pembayaran kepada benefisiari dibuat (lihat perenggan 86–87).

(5) Defendan telah bertindak seolah-olah harta pusaka si mati berada di bawah kuasa peribadinya sendiri dan beliau berhak untuk mengabaikan keputusan mahkamah, terma wasiat dan undang-undang yang terpakai. Wang harta pusaka telah diagihkan tanpa alasan dan hak benefisiari dan perintah yang dibuat oleh mahkamah telah diabaikan. Jika defendan terus mentadbir harta pusaka, ia akan kekal tidak dapat diselesaikan dan pihak-pihak akan terus bertelagah dan mempunyai pertikaian tanpa henti sehingga menimbulkan litigasi lanjut yang tidak sesuai dengan kepentingan harta pusaka dan benefisiari. Oleh itu, terdapat sebab yang mencukupi untuk mahkamah ini, berpandukan s 34 Akta Probet dan Pentadbiran 1959 dan s 40 Akta Pemegang Amanah 1949, untuk memecat defendan sebagai pentadbir harta pusaka dan melantik pentadbir baharu menggantikannya (lihat perenggan 88 & 91–93).]

Cases referred to

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [1998] 4 MLJ 268, CA (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors, Re [1981] 2 MLJ 68; [1981] 1 LNS 78, FC (refd)

Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal [2017] SGHC 90, HC (refd)

Ligar Fernandez v Eric Claude [2002] 5 MLJ 177; [2002] 6 CLJ 152, HC (refd)

Ng Kong Ling & Anor v Low Peck Lim & Ors [2017] 4 MLJ 21; [2017] 5 CLJ 651, FC (refd)

Robert Teo Keng Tuan v Chew Chong Eu & Anor [2015] MLJU 895; [2015] 7 CLJ 508, HC (refd)

Shirley Kathreyn Yap v Malcolm Thwaites [2016] 5 MLJ 602; [2016] 8 CLJ 765, FC (refd)

Siti Fatihah bt Diman & Ors v Diman bin Hassan & Ors [2021] MLJU 2420; [2021] 1 LNS 2055, HC (refd)

Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, CA (refd)

Tan Kah Fatt & Anor v Tan Ying and another appeal [2021] MLJU 284; [2021] 1 LNS 264, HC (folld)
Tang Seng Cheong & Anor v Wong Pooi Yen [2019] MLJU 2047; [2019] 1 LNS 2279, HC (refd)
Virgin Atlantic Airways Limited v Zodiac Seats [2013] UKSC 46, SC (distd)

Legislation referred to

Partnership Act 1961 s 35
Probate and Administration Act 1959 ss 34, 60, 67, 70, 77, First Schedule, Part II
Rules of Court 2012 O 72 r 7
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 80
Trustees Act 1949 s 40

B Thangaraj (with M Nalini) (Thangaraj & Assoc) for the plaintiff.
Syamsul Azhar bin Aziz (Azhar Aziz & Assoc) for the defendants.

Mohd Arief JC:

INTRODUCTION

[1] The plaintiff is only seeking the following orders against the defendants:

(a) *satu akaun dan siasatan dan satu perintah untuk mengesan sekiranya perlu untuk bantu dalam menentukan bayaran yang tidak sah dan semua perbelanjaan yang tidak berpatutan yang dikenakan ke atas Harta Pusaka Wong Poi Fong @ Wong Swee Fong dan dibayar keluar oleh defendan pertama daripada akaun harta pusaka Wong Poi Fong @ Wong See Fong hendaklah dibayar kembali oleh defendan kedua dalam kapasiti peribadinya ke dalam akaun Harta Pusaka Wong Poi Fong @ Wong Swee Fong selepas ditentukan dan diperakui oleh mahkamah;*

(b) in the alternative, an order that:

secara tambahan dan/atau alternatif, suatu perintah untuk pentadbiran harta pusaka tak alih dan alih Wong Poi Fong @Wong Swee Fong, Si Mati dengan semua akaun, arahan dan siasatan yang perlu dan patut dijalankan oleh mahkamah untuk menentukan:

(c) *harta tak alih dan alih Wong Poi Fong @Wong Swee Fong, si mati yang sampai ke tangan defendan pertama;*

(d) *semua bayaran tidak sah dan semua perbelanjaan yang tidak berpatutan yang dikenakan ke atas harta pusaka Wong Poi Fong @Wong Swee Fong dan dibayar keluar oleh defendan pertama daripada akaun harta pusaka Wong Poi Fong @Wong Swee Fong dan jumlah yang ditentukan dan diperakui oleh mahkamah hendaklah dibayar kembali oleh defendan kedua dalam kapasiti peribadinya ke*

dalam akaun harta pusaka Wong Poi Fong @Wong Swee Fong;

(e) *apa yang kena dibayar oleh plaintif daripada harta pusaka Wong Poi Fong @Wong Swee Fong, si mati dan defendan pertama membayar kepada plaintif dalam tempoh masa tujuh hari daripada tarikh perintah jumlah yang diperakui oleh mahkamah yang kena dibayar oleh defendan pertama daripada harta pusaka kepada plaintif dan/atau jumlah yang dipertanggungjawabkan oleh mahkamah untuk defendan kedua membayar dengan sendirinya kepada plaintif selepas siasatan dijalankan mengikut perenggan 3(b) di atas;*

(f) *kebebasan untuk memohon; dan*

(g) *relif selanjutnya atau relif lain.*

[2] Essentially, the plaintiff is seeking for the accounts of the estate and an investigation be undertaken into its affairs to determine whether the defendant, Wong Yee Mei @ Cynthia, has been administering the estate in accordance with her duties as an administrator appointed by the court.

[3] The plaintiff's counsel confirms that his client will not pursue the other orders as prayed in the originating summons.

BACKGROUND OF FACTS

[4] The late Wong Poi Fong @ Wong Swee Fong was the father of the plaintiff and the defendant. He was a relatively successful businessman during his lifetime and held the following assets running several businesses among others:

(a) shares in a partnership known as PJ Wong (000240158);

(b) shares in a company known as Pekeliling Services Stesen Sdn Bhd (004829-W); and

(c) shares in a Stesen Servis Weng Heng (Pudu) Sdn Bhd (115452).

The late Wong Poi Fong also owned a property known as Geran 10901, Lot 270, Seksyen 0067, Bandar Kuala Lumpur.

[5] The deceased left a will which was executed on 3 March 1978 and the defendant, Wong Yee Mei (Cynthia), was appointed as the administrator of the estate pursuant to the order of court dated 16 December 2013.

[6] A dispute arose between the plaintiff and the defendant concerning the business known ran under the company known as Pekeliling Services Station Sdn Bhd ('PSSB'). A derivative action was filed by the defendant, as the

administrator of the estate, against the plaintiff in the suit bearing number WA-22NCC-136–04 of 2016.

[7] In the aforesaid suit, the defendant alleges that the plaintiff had unlawfully taken over the license awarded by Shell for the petrol service station that was earlier ran by PSSB. The defendant alleges that the plaintiff had hijacked the business under the nose of PSSB and that she had then caused the business to be taken over by a registered business known as YW Global, that is owned by the plaintiff.

[8] The claim was heard by Noorin Badaruddin J by way of a full trial and the defendant's claim was dismissed as seen in the judgment dated 13 April 2017.

[9] Therefore, the issue of whether the plaintiff is guilty of any wrongdoing concerning the PSSB and the licenses relating to the said entity is no longer an alive issue. This issue has been decided by the court and parties are not entitled to reopen the same issue again before me.

[10] I also note that the Court of Appeal had also affirmed the order of the High Court dismissing the defendant's claim against the plaintiff.

[11] The plaintiff also found that the estate of Wong Poi Fong @ Wong Swee Fong is allegedly entitled to receive the proceeds of sale of an asset owned by the estate of Wong Kim Seng. The plaintiff's solicitors then requested particulars of the proceeds received by the estate and information as to whether the said sums remain with the estate or have been distributed in accordance with the will. This is seen in the letter dated 16 June 2017 issued by the plaintiff's solicitors.

[12] In response, the defendant's solicitors, Messrs Richard Tee & Chin, by letter dated 5 July 2017, confirmed that there were sums of monies received from the estate of Wong Kim Seng but reassured that the said monies remain in the accounts of the estate and will not be released or distributed pending the decision of the Court of Appeal.

[13] This was followed by subsequent letters issued by the plaintiff's solicitors dated 19 July 2017 seeking the information as to the sale of the assets of the estate of the deceased and relevant information concerning the distribution of the assets or monies belonging to the estate. The plaintiff's solicitors also rebuked the defendant's arguments contained in the earlier letter dated 5 July 2017.

[14] A second dispute started to brew between the litigants as seen in the

letter dated 28 February 2018 from the defendant's solicitors. The defendant contends that, Magnum Corp Sdn Bhd license to operate held by PJ (Wong) is to be held by the defendant. They also contend that this arrangement was consented to by the beneficiaries including the defendant and forwarded a copy of the acknowledgment and agreement dated 27 September 2011 and the letter dated 15 January 2016 allegedly from the plaintiff confirming the same.

[15] This dispute started even as early as 18 October 2011, when the other beneficiaries of the estate wrote a letter on the aforesaid date, demanding that the administration and management of PJ (Wong) be handed over to them.

[16] The defendant also wrote a letter to the plaintiff seeking that all the proceeds from the enterprise of PJ (Wong) that belong to the estate be paid into the account in the name of the estate. This is seen in the letter dated 21 September 2015.

[17] The above demands were rebuffed by the plaintiff in the letter dated 15 January 2016. In her response, she stated that the license will only be transferred if Magnum agrees to do so and that this decision lies with the said entity. At the same time, she stated that she will agree to the transfer if the other beneficiaries agree to purchase her interest at the current market value.

[18] She also stated that the returns of the said enterprise are currently paid into an account with Alliance Bank and are being operated by Lim Chin Beng, the other partner, in the said enterprise. The entitlements from the proceeds of the said enterprise will be paid from the account and the surplus will be retained by PJ (Wong) for operations and working capital. She also rebuked the other beneficiaries' claims concerning PSSB.

[19] Eric Wong Yee Leong, one of the beneficiaries of the estate, passed away on 7 March 2018. His son Marc Wong Yip Loon has since been appointed as the administrator of the estate of Eric as seen in the order dated 16 December 2019.

[20] This was followed by the letter dated 30 March 2018 issued by the defendant's solicitors to the plaintiff's solicitors. The defendant reiterated the contents of the previous letter concerning the running of the PJ (Wong) business by the defendant as trustee for the estate and that this was agreed to by all beneficiaries.

[21] The allegations made by the defendant's solicitors, provoked a response from the plaintiff's solicitors dated 15 March 2018. In the aforesaid letter, the plaintiff's solicitors stated that the: (a) the issue pertaining to PSSB has long been settled by the decision of the court and should not be revisited; and (b) the

defendant is to provide the accounts relating to the estate of the deceased. Until the accounts are rendered, the proceeds of the PJ (Wong) business shall be kept in the Alliance Bank account identified by the plaintiff.

[22] The plaintiff's solicitors had also issued a letter dated 10 April 2018 again seeking the particulars of the accounts of the estate.

[23] The plaintiff had also brought proceedings against the defendant in the suit bearing number WA-24NCVC-2004–11 of 2017 where the plaintiff successfully obtained the following orders dated 26 July 2018:

> 1) Defendan dalam tempoh masa empat belas (14) hari daripada tarikh perintah ini mengemukakan dan menentusahkan kepada Plaintif melalui suatu affidavit yang diikrar oleh Defendan berkenaan:
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> a) segala wang dan hasil yang diterima semasa pentadbiran Harta Pusaka Wong Poi Fong @Wong Swee Fong daripada 16 Disember 2013 sehingga sekarang;
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> b) butir-butir berkenaan wang yang dibayar keluar oleh Defendan daripada Harta Pusaka Wong Poi Fong @Wong Swee Fong dan kepada siapa, tarikh dan jumlah yang telah dibayar keluar;
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> c) penjualan tanah yang dikenali sebagai GRN 10901 Lot 270, Seksyen 97, Kuala Lumpur, Wilayah Persekutuan ('Hartanah berkenaan'):
>
> (i) berapakah jumlah yang diterima oleh Defendan daripada Pentadbir Harta Pusaka Wong Kim Seng daripada penjualan Hartanah berkenaan;
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> (ii) adakah hasil Jualan Hartanah berkenaan yang telah diterima daripada Pentadbir Harta Pusaka Wong Kim Seng telah diagihkan, dan sekiranya diagihkan, kepada siapa dan bilakan agihan tersebut dilakukan;
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> (iii) berapakah baki hasil jualan yang diterima daripada jualan Hartanah berkenaan masih dalam simpanan Defendan.
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> 2) Defendan membayar kepada Plaintif bahagian Plaintif daripada hasil jualan Hartanah berkenaan dalam tempoh masa empat belas (14) hari daripada tarikh perintah ini; dan
>
> 3) kos bagi prosiding ini ditetapkan sebanyak RM4,000.00 dan hendaklah dibayar oleh Defendan secara persendirian kepada Plaintif.

[24] Pursuant to the said order, the plaintiff affirmed an affidavit dated 9 August 2018 and attached the excerpts from the cash book of the estate of the deceased. The defendant continues with her allegation that the estate of the deceased does not owe any sums to the plaintiff on the ground that the plaintiff had unlawfully taken over the PSSB license and the business of PJ (Wong) from the estate. The contents of the cash book of the estate will be explained by me

A in the substantive portion of this judgment.

[25] Dissatisfied with the contents of the affidavit, the plaintiff's solicitors then issued another salvo to the defendant's solicitors via letter dated 10 April 2018. In the aforesaid letter, the plaintiff alleges that the defendant did not comply with the orders of the court and failed to disclose the accounts. This was followed up by the letter dated 8 January 2019 where the contents of the cash book, payments made, and the administration of the estate were questioned by the plaintiff's solicitors. The defendant's solicitors then issued her response via letter dated 31 January 2019.

[26] The important fact that I must also determine is whether the undated letter entitled acknowledgment and agreement, that allegedly confirms that all sums outstanding to the defendant shall be reimbursed from the estate to her and this will be at the absolute discretion of the defendant. The plaintiff denies putting her signature to the document and as such this document was put in Part C for the purposes of the trial.

[27] Another important factor that I must take into account is the dissolution of the original partnership known as PJ (Wong) on the death of the deceased on 9 September 2004. Thereafter, a new partnership came into being as seen in the search undertaken at the Companies Commission Malaysia, where it is shown that as of 15 October 2004, a new partnership was set up consisting of: (a) Lim Chin Beng, who remained a partner from the original partnership; (b) Wong Yee Mei @ Cynthia (defendant); (c) Yvonne Wong Yee Woon (plaintiff); and (d) Eric Wong Yee Leong.

[28] The evidence also indicates that the defendant and the beneficiaries of the estate have been drawing from the partnership as early as 2005. Eric Wong and the defendant have been drawing funds from the partnership as seen in the accounts produced by PJ (Wong) showing the distribution of funds from the said partnership.

APPLICABLE LAW

[29] It is trite law that the defendant, as the administrator of the estate, owes fiduciary duties to the beneficiaries of the estate. The defendant is a trustee and must act, first and foremost in the best interest of the beneficiaries.

[30] On the issue of whether a party has a duty to the account was dealt with by the Federal Court in two cases. The first of which is *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73 and in *Shirley Kathreyn Yap v Malcolm Thwaites* [2016] 5 MLJ 602; [2016] 8 CLJ 765.

[31] Md Raus Sharif PCA (as he then was) in *Shirley Yap Kathreyn Yap v Malcolm Thwaites* explained the applicable law on this area as follows: A

[42] Thus, the issue before us is whether the trial judge was right in finding that the defendant has a duty to account to the plaintiff. In *Alcatel- Lucent (Malaysia) Sdn Bhd v Solid Investments Ltd & Another Appeal* [2012] 4 MLJ 72; [2013] 2 CLJ 734 ('Alcatel') the trial judge had made a finding of a fiduciary and an accounting party when these were not pleaded in the statement of claim. The Court of Appeal in allowing the appeal, observed that: B

> for there to exist a complete cause of action for taking accounts, the respondent has to plead and prove the following: C
>
> (a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent as the plaintiff; and
>
> (b) the appellant (as the defendant) is an accounting party to the respondent (as the plaintiff). D

[43] The Court of Appeal in *Alcatel* also held that:

> The learned judge had gone beyond the pleaded case when he made a finding that the appellant was an accounting party because of an alleged fiduciary relationship between the appellant and the respondent when this was neither pleaded nor proven. E

[44] On appeal by *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73, the Federal Court dismissed the appeal and affirmed the decision of the Court of Appeal. The question of law posed before the Federal Court was as follows: F

> Whether in asserting whether parties stand in a fiduciary relationship a court is to have regard to the course of dealings between the parties in addition to any express agreement between them.

[45] In resolving the said question of law in the affirmative, the Federal Court observed with approval that the Court of Appeal had extensively dealt with the law relating to the duty to account under the common law as stated, *inter alia* in *Baboo Janokey Doss v Bindabun Doss* [1843] Moore Ind App 175; *Re Cyril Sharp And Others* [1992] FCA 616 and *Bristol & West Buidling Society v. Mothew* [1998] Ch 1. G

[46] In *Baboo Janokey Doss v Bindabun Doss*, Dr Lushington of the Privy Council at p 197 said: H

> ... we cannot make a Decree, ordering them to account, without first determining that they are liable to pay if anything to be found.
>
> A Decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a Decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting. I

A [47] In *Re Cyril Sharp*, the Federal Court of Australia through Drummond J opined:

> The taking of an account is only appropriate once it is established that the parties involved are in an accounting relationship with each other, that is, only once it has been established that one party is liable to pay to the other anything that is found, on the taking of account, to be due to that other ...

B [48] In *Bristol and West Building Society v Mothew*) at p 18, Millet LJ made the following observation on the question of law as who is a fiduciary:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence ...

C **[32]** The duties owed by an executor to the beneficiaries were explained by Aedit Abdullah JC in the Singaporean case of *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90, as follows:

D

> 13 In the present proceedings, it was not disputed that both executors and trustees owe fiduciary duties to the beneficiaries of an estate in relation to the administration of that estate. In *Lee Yoke San and another v Tsong Sai Cecilia and another* [1992] 3 SLR(R) 516 ('Lee Yoke San'), the High Court held that (at [35]):
>
> E
>
> > An executor 'calls in' the estate that collects and converts the assets into cash, and pays all the funeral and testamentary expenses, estate duty, debts and legacies. When he has done this, he has discharged his duties as an executor. Then he steps into the shoes of a trustee. He owes a fiduciary duty to the beneficiaries, whether he is an executor or trustee.
>
> F
>
> 14 As an incidence of this fiduciary relationship, the executor or trustee owes several specific duties to the beneficiaries of the estate, including the duty to determine the extent of the testator's assets and liabilities, to act diligently in the realisation of such assets, and to pay for the testator's debts and testamentary expenses (see generally
>
> G
>
> *Foo Jee Boo and another v Foo Jhee Tuang and others* [2016] SGHC 260 ('Foo Jee Boo') at [73]–[83]). These specific duties are set against the backdrop of a general duty on the part of the executor or trustee to act with impartiality in the best interests of the beneficiaries (*Lee Yoke San* at [35]; *Foo Jee Boo* at [83]).

H **[33]** The case is also useful concerning the duty to account on a common basis and under what circumstances would an executor be made accountable to a beneficiary:

(a) the taking of account is usually divided into three phases: (i) determining whether the claimant has a right to an account; (ii) the taking of the account; and (iii) determining the consequential relief;

I

(b) the executor's duty to account is not contingent of any allegation or even the establishment of any breach of trust or breach of duty;

(c) the duty to account is continuous on demand and does not have to be discharged solely at the time of the distribution of the asset;

(d) the court may decline to force the trustee/executor to account if it is: (i) oppressive to the trustee depending on the circumstances of each case; (ii) that there are good reasons not to allow the same; and (iii) there was a settlement on the trust account that the beneficiary is attempting to renege on; and

(e) the executor must provide a proper, complete, and accurate justification and documentation for his actions as trustee. If there are allegations of breaches of trust, neglect, or failure to act then there may be more details that need to be disclosed. This is however fact sensitive.

[34] If it is shown that the executor is guilty of any wrongdoing, then he or she must be made accountable to the estate and the beneficiaries. Once the accounts are undertaken, and it is shown that the estate is depleted due to reasons that the executor may be held accountable for, then the executor may be directed to make good any deficit or losses caused to the estate and to the beneficiaries.

[35] Although the case cited above deals with Singaporean law, I am of the opinion the same legal principles are applicable in Malaysia as well.

[36] I also refer to the decision of the Court of Appeal in *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268 where Shaikh Daud JCA, inter alia, held:

> On the complaint of the failure to render accounts or periodic accounts the conduct of the appellants showed an obvious reluctance to render such accounts. This is in spite of four years of executorship. Up to the date of the trial no accounts had been rendered. In fact the record shows that two months after the respondents filed their originating motion, an application was made by them to obtain an injunction to restrain the appellants from dealing in whatsoever manner in the assets of the estate. At the hearing for that application learned counsel for the appellants informed the court that accounts were being prepared but right up to the date of the judgment in July 1995, the accounts were neither prepared nor submitted. This is clear evidence of reluctance to render accounts or in any way be accountable as to the financial position of the estate. The very first time the accounts were filed was in December 1995 when this court ordered, as a condition of an order of stay of the Johor Bharu High Court order that the second appellant file and serve an affidavit containing the accounts to the respondents within one month of the date of the stay. The delay to extract the grant of probate is clearly deliberate for until that was done there is no obligation to distribute and wind up the estate.
>
> The duty to render accounts is one of the basic duties of all executors or trustees. It is the duty of the personal representatives to keep clear and accurate accounts, and to be ready at all times to render such accounts when called upon to do so, see

A *Halsbury's* 4th Edn Vol 17 at para 1551 under 'Liability to Account'. By the terms of the deceased's will the issue of accounts is all important since the residue for distribution is derived at only after deductions of debts and expenses have been made. Without the accounts being rendered periodically or at all (as in this case), the beneficiaries would not have any means of knowing whether the estate is being B administered properly.

[37] Another important area that I would like to address is the issue of the duties of the administrator. It is trite law that an administrator of the estate must 'call-in' the assets of the deceased, this would include real and personal C assets. The administrator must determine the assets and liabilities of the deceased. The assets of the deceased must be utilised to pay: (a) the expenses incident to the due performance of the duty of the administrator eg, the costs of obtaining the grant of probate/letter of administration; and (b) the debts of the deceased. D

[38] The administrator is required to act in the best interest of the beneficiaries and must act in accordance with the terms of the will. Refer to ss 60, 67, 70, 77 and Part II of the First Schedule of the Probate and Administration Act 1959. E

PRELIMINARY ISSUES

[39] Before I deliberate on the substantive issues raised by the litigants in this F suit, I would like to deal with two preliminary issues that raised their heads during the trial. These are:

(a) the effect of the earlier decisions of the courts in the suit bearing number WA-22NCC-136–04 of 2016 and suit bearing number WA-24NCVC-2004–11 of 2017; and G

(b) the status of the partnership is known as PJ Wong.

[40] I am of the opinion that the issues raised and decided in these two proceedings are now subject to the doctrine of res judicata and the litigants are H not entitled to rehash the same issues again before me.

[41] I refer to the decision of the Federal Court in *Ng Kong Ling & Anor v Low Peck Lim & Ors* [2017] 4 MLJ 21; [2017] 5 CLJ 651, where Md Raus Sharif PCA (as he then was) stated: I

[37] In *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 the Supreme Court had held that when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more over the same matter because the judgment 'becomes the truth between the parties'. Where a matter has

been adjudged, the Supreme Court held that an estoppel per rem judicatum arose to prevent a party from relitigating the cause or issue. The Supreme Court held as follows:

...

[38] Thus, the issue of estoppel could be raised whether or not the cause of action in the first proceeding is by nature the same as the second proceedings. Diplock LJ in *Fideltas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 explained:

> It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue has been determined.

[42] I also refer to the decision of the Court of Appeal in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062, where Idrus Harun JCA stated:

[19] The next point raises questions which concern the issue of the application of the doctrine of estoppel and res judicata to the present appeal. In fact the substantial part of the argument before us turned on this critical issue which in our view will ultimately determine this appeal. The terms 'res judicata', 'issue estoppel' and 'cause of action estoppel' are sometimes used loosely but the modern tendency has been to use res judicata comprehensively to cover all those terms of estoppel (see *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 548 and *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534). *Res judicata simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatam. The res judicata rule dictates that when a matter between two parties has been adjudicated by a court, the matter may not be pursued further by the same parties and their privies because the judgment becomes the truth between such parties, its application produces finality in litigation and one ought not to be vexed twice for the same cause of action. Since a res judicata creates an estoppel per rem judicatam, the doctrine of res judicata is really the doctrine of estoppel per rem judicatam (see Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783).

[20] The plea of res judicata comprises two distinct forms of estoppel that is to say, cause of action estoppel and issue estoppel. Drake J in *North West Water Ltd v. Binnie & Partners (a firm)*, stated that cause of action estoppel was confined to cases where the cause of action and the parties were the same in the second suit as they were in the first suit. In such a case the bar is absolute (*OCBC Bank (Malaysia) Bhd v Kredin Sdn Bhd*). On the other hand, issue estoppel would involve going over precisely the same issue or point already decided in the first action or refer to an issue that has been previously litigated and determined between the same parties and the same issue is raised in a subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to reopen the issue. The High Court decision in *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2010] 8 MLJ 57; [2009] 1 LNS 1457 *clearly shows that the requirements of issue estoppel are that the parties to the judicial decision or their privies were the same persons as the parties*

to the proceedings in which the estoppel is raised and that the same question had been decided. In Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd, supra the Supreme Court succinctly explained that the term 'issue estoppel' literally meant simply an issue which a party was stopped from raising in subsequent proceeding. Issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action (see also Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228; [2010] 7 CLJ 491).

[43] The second issue I would like to address is whether the partnership known as PJ Wong continues to exist after the death of the deceased.

[44] Parties have not produced any written agreement that contains the terms of the partnership that were agreed upon at the time of the lifetime of the deceased. The partnership at that time, based on the records available to me, was between the deceased and one Lim Chin Beng.

[45] Section 35 of the Partnership Act 1961 provides that unless the partners agree otherwise, the partnership will be dissolved by the death or the bankruptcy of a partner. This will not be automatic if the partnership agreement provides for the exclusion of the deceased partner or the partner who is adjudicated bankrupt. However, as I have said earlier, the parties did not produce any partnership agreement. Please refer to *Robert Teo Keng Tuan v Chew Chong Eu & Anor* [2015] MLJU 895; [2015] 7 CLJ 508.

[46] Furthermore, the documents produced based on the search done with the CCM, indicate that as of 15 October 2004, a new partnership was set up consisting of: (a) Lim Chin Beng, who remained a partner from the original partnership; (b) Wong Yee Mei @ Cynthia (defendant); (c) Yvonne Wong Yee Woon (plaintiff); and (d) Eric Wong Yee Leong. Since then, Eric Wong Yee Leong has also passed away and therefore even the existence of this new partnership is doubtful as parties again failed to produce a copy of the partnership agreement.

[47] Therefore, I believe the partnership then existed between the late Wong Poi Fong @ Wong Swee and Lim Chin Beng ended on the death of the deceased. This was replaced by the new partnership between Lim Chin Beng and the beneficiaries of the estate of the deceased.

[48] These ancillary issues are important in the determination of the substantive issues in this case.

DECISION ON THE PLAINTIFF'S CLAIM

Issues in dispute

[49] The plaintiff in her written submissions has identified the common issues that need to be determined by this court. They are:

(a) whether there is any amount payable from the Estate of Wong Poi Fong @ Wong Swee Fong (deceased) to the plaintiff, and if there is any amount payable, what is the amount which the plaintiff is entitled to be paid by the first defendant as the 1/6 beneficiary of the estate of Wong Poi Fong @ Wong Swee Fong (deceased)? (Issue 1);

(b) from the cash book of the estate of Wong Poi Fong @ Wong Swee Fong (deceased) prepared by the first defendant and enclosed as exh CYM1 to the first defendant, what are the amounts which were wrongfully paid out by the first defendant from the account of the estate of Wong Poi Fong @ Wong Swee Fong (deceased)? (Issue 2); and

(c) is the first defendant then liable to — pay back all the amounts which were wrongly paid out from the account of the Estate of Wong Poi Fong @ Wong Swee Fong (deceased) and — pay the plaintiff the amount which the plaintiff is entitled to receive as 1/6 beneficiary of the Estate of Wong Poi Fong @ Wong Swee Fong (deceased) (Issue 3 and Issue 4).

I will address the above issues in the following paragraphs.

Issue 2 — Whether there are any amounts that are wrongly paid from the accounts of the estate of the deceased

[50] As I have alluded earlier, the plaintiff is not seeking to remove the defendant as an administrator of the estate. Instead, the plaintiff is seeking that the defendant to provide an account of the assets and liabilities of the estate to determine whether the sums expended was undertaken wrongly by the defendant. As explained earlier, the law expects that an administrator provides information pertaining to the administration of the estate with the beneficiaries. This includes a complete and accurate statement of the accounts with the necessary documentation to justify his or her actions as a trustee.

[51] In this case, it is apparent to me that there is a strained relationship between the defendant and the plaintiff. The relationship deteriorated rapidly with the loss of the PSSB license to the plaintiff and regarding the refusal of the plaintiff to transfer the license held by PJ (Wong) or any sums of monies received from the new petrol station and PJ (Wong) to the other beneficiaries.

[52] However, I am of the opinion that the defendant should have disregarded the issue concerning the PSSB license and the PJ (Wong) for the following reasons.

[53] Firstly, the issue PSSB license and the claims for profits against the plaintiff were resolved against the defendant by orders of the courts. This issue should no longer color the defendant's view of the facts of the case and the mechanism/methods in which the estate is being administered. Despite her personal views, the orders and decisions of the courts should be respected and reflected in the administration of the estate.

[54] Secondly, regarding PJ (Wong), it is clear to me that the partnership now as it stood during the lifetime of the deceased no longer exists. PJ (Wong) as it stands now is a new partnership and the monies belong to the partners in accordance with the terms of the partnership. The license as it stands now also belongs to the new partnership and not with the old partnership. The defendant should have collected the monies and assets that are due from the partnership at the dissolution and account them to the estate. She should not have administered the estate as if the partnership continued after the death of the deceased.

[55] I also find, having considered the evidence of parties and the accounts produced by the defendant, that the substantial payments made by the defendant as the administrator of the estate under her administration were wrongly undertaken. The estate should not have incurred these expenses or provided these loans unless they were agreed to unanimously by the beneficiaries. I reproduce the table that explains the monies expended by the estate to the sum of RM2,161,162.41 that I find were wrongly expended from the estate of the deceased:

No	Date	Description	Outflow (RM)
1.	9 May 2005	Loan to Pekeliling Service Station (PSS)	49,000
		Loan to Pekeliling Service Station	215,000
		Loan to Pekeliling Service Station	250,000
		Loan to Pekeliling Service Station (postdated cheques issued)	170,000
		Mom's medical bill	39,314.38
		Advance to Eric	200
2.	12 October 2006	IOU Yvonne	300
		Chicken Man — Taman Muda (Ah Bee)	300
		Amount paid to Evi (Domestic Maid)	5,500

		Air Ticket for Evi to Indonesia Transport by Maid Agency Evi's pay (Jan 2007–May 2007)	329.90 120 2,250
3.	10 October 2006	Sent to Indonesia (Evi Maid) Kota Kemuning House (Quit Rent, assessment charge & TNB)	810 757.60
4.	1 March 2007	Clear off overdraft for PSS mom's house charged Angel's Decoration (upholstery of sofa) S&P and documentation of KK house Interest on loan Interest on loan	7,000 850 10,805 16,072.27 2,523.75
5.	1 March 2009	To settle PSS overdraft facility	165,000
6,	7 March 2009	Remittance to Irene Lai Ling — Ching	18,444.60
7.	23 March 2011–5 May 2011	Amount advanced to Eric (2011–2015)	130,162.33
8.	1 May 2016–31 August 2016	Distribution of receipts to Eric's next of kin-Eric Wong	16,000
9.	1 September 2016–31 July 2018	Rental of coffee shop and Magnum	59,800
10.	27 January 2016	Payment to Eric Wong Yee Leong	465,706.61
11.	5 February 2016	Payment to Ellen Wong Yee Lin	514,150.97
12.	5 January 2018	Payment to Eric Wong Yee Leong Payment to Ellen Wong Yee Lin Payment to Cynthia Wong Yee Mei	742.50 371.25 371.25
13.	7 March 2018	Payment of Eric Wong Funeral Expenses	7,480
14.	17 April 2018	Payment of Eric Wong Funeral Columbarium	11,800
		TOTAL	RM2,161,162.41

[56] These sums were not part and parcel of the estate's obligation. The defendant should have only complied with the requirement of the law. The assets of the estate should be called in and utilised to pay the debts of the estate. She should not have incurred any expenses beyond what is provided in law. She does not have absolute discretion and she has forgotten or disregarded the requirements of complying with the terms of the will. As an example, it is not the duty of the estate to pay for the loans of PSSB, the medical bills of the wife of the deceased, maid fees, and maid travelling expenses. She should have also not transferred funds solely to Eric Wong or covered Eric Wong's funeral expenses. These are beyond the scope of the terms of the will and beyond the appropriate scope of the administration of the estate.

[57] I refer to the judgment of Mohd Firuz Jaffril J's in *Tang Seng Cheong & Anor v Wong Pooi Yen* [2019] MLJU 2047; [2019] 1 LNS 2279, where he stated:

> [23] With reference to question (iii) which requires the defendant to furnish the plaintiff with verified accounts and inventory of all the assets of the late Chia Yee Hoong is concerned, the defendant herself acknowledges that s 62 of the Probate and Administration Act 1959, does impose such a duty on her to provide a true and perfect inventory and account of the movable and immovable property of the deceased (see also the Court of Appeal decision in *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [2012] 1 LNS 492). Hence, there is no necessity for this court to answer question (iii).
>
> [24] With reference question (iv) which requires the defendant to furnish the bank statements and all the bank share account statements of the late Chia Yee Hoong from January 2015 till to date, this court agrees with the defendant's submission that her duties as Executor only covers monies and shares belonging to the CYH as at the date of her demise (see the Judicial Committee of Privy Council decision in *SMKR Meyappa Chetty v. Supramaniam Chetty* [1916] 1 AC 263). Nevertheless, for purposes of transparency, impartiality and gesture of goodwill, bearing in mind that the task of obtaining the statements and the bank share account statements from January 2015 till to date from the various third parties is not too onerous, this court takes the view that it is incumbent on the defendant to provide the documents requested to all beneficiaries of the Estate.
>
> [25] With reference to questions (v) and (vi) which requires the defendant to obtain from one Chan Lai Mun, the executrix of the Estate of the late Tang Tuck Ngow all the bank and share account statements that were bequeathed to the late Chia Yee Hoong as stipulated in the last will and testament of Tang Tuck Ngow dated 22 May 2009 and an inventory of all the assets that were bequeathed to the late Chia Yee Hoong as stipulated in Tang Tuck Ngow's will, both parties herein agrees that only the defendant is vested with the right to obtain such documents see s 59 of the Probate and Administration Act 1959). Without having these documents, and comparing them to what assets the estate of CYH has at the time of CYH's demised, there exists a strong degree of probability that the accounts of the CYH estate prepared by the defendant not being accurate.
>
> The duty to keep clear and accurate accounts and to be ready to at all times to render

such accounts when called upon to do so is emphasised in *Halsbury's Laws of England* (4th Ed) at para 1551 and referred to with approval by the Court of Appeal in *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors.*

[58] However, I am of the opinion that the legal fees incurred by the defendant and legal fees for the Federal Court's case were a genuine attempt by the defendant to resolve a dispute between the beneficiaries and the administrator. This would be an appropriate expense to ensure that the issue is resolved before a court of law. However, the other expenses were not validly incurred and are beyond the scope of the will and her duties as the administrator of the estate of the deceased.

[59] I also find that the defendant had wrongfully favored the other beneficiaries of the estate by making distributions to them and their next of kin. I reproduce the sums of monies that were paid to the Eric Wong and his next of kin. I find that the defendant has chosen not to pay any sums to the plaintiff without any justification:

No	Date	Description	Outflow (RM)
1	23 March 2011–5 May 2015	Amount advanced to Eric Wo	130,162.33
2	1 May 2015–31 August 2016	Distribution of receipt to Eric's next of kinng (2011-2015)	16,000
3	1 September 2016–31 July 2018	Distribution of receipt to Eric's next of kin (with rental of coffee shop and magnum)	59,800
4	27 January 2016	Payment to Eric Wong Yee Leong	465,706.61
5	5 February 2016	Payment to Ellen Wong Yee Lin	514,150.97

[60] The other important factor that I have taken into account is that the defendant has not supported these payments without any documentation and without any legal justification. The defendant is duty bound to act in accordance with the terms of the will and should not put her personal views and grievances to color the administration of the estate. I appreciate the concern raised by the defendant but the issue of the PSSB license is no longer an alive issue and should have been disregarded by her. These issues have been decided by judgment of the courts hearing the earlier suits between the parties. It is not appropriate for the defendant to disregard the said judgment and to color the terms of the distribution based on her personal views. The defendant chose to incur expenses that were not part and parcel of the administration of the estate. I find that these expenses should be reimbursed by her to the estate.

[61] Regarding the missing documents, the defendant explained that the documents were missing caused by termites and produced pictures of the files

A that were allegedly eaten by termites. However, I find that the request for accounts was made many times by the plaintiff and had even caused the plaintiff to issue a proceeding before to seek such accounts from the defendant. The defendant chose not to even produce documents even as early as 2017.

B **[62]** The defendant had also failed to provide the accounts of the estate to the plaintiff despite repeated attempts made by the plaintiff for her to disclose the details of the estate. As I have said earlier, the defendant has a duty to render accounts or periodic accounts to the beneficiaries of the estate. This would include the plaintiff and the accounts were only disclosed by the defendant C after the order of the court. The conduct of the defendant clearly shows a lack of candour contrary to what is expected of a trustee that must act in the best interest of the beneficiaries in accordance with the terms of the will.

D **[63]** Therefore, I find that the defendant did not act appropriately in the administration of the estate. I find that the administration of the estate was undertaken not in accordance with the terms of the will but solely according to her personal views, bias, and personal grievances against the plaintiff.

E **[64]** I also find that the defendant was less than candid when she gave evidence during the course of the trial. She had continuously refused to answer questions put by counsel for the plaintiff and even by this court. She was evasive and her answers, I find, were short of the truth. Therefore, in view of the evasive nature of the defendant and her conduct during the course of the trial, F including failure to provide documents as requested by the plaintiff and pursuant to the orders of court, I prefer the evidence of the plaintiff to hers. I find that she is not a credible witness and that her actions are short of what would have been expected of a trustee/administrator acting in accordance with her duties in law. For instance, the excerpts of her evidence during G cross-examination are as follows:

> Q: Miss Cynthia, coming to the account, would you confirm despite repeated request by the Plaintiff, you did not render the account to the Plaintiff until the court order was obtained?
>
> H A: I disagree.
>
> Q: When was the first time you render the account to the Plaintiff?
>
> A: In 2015.
>
> Q: What was the account?
>
> I A: It was done by the forensic accountant. Yes before we had any legal proceeding because we wanted to settle everything amicably. And all beneficiary accordingly is agreeable to take action against Yvonne for the Pekeliling Service Station. So we didn't have any money except for the assets. If you were look at the page 13, Pekeliling Service is an asset that is why I only administrating to the estate of my father. I try to administer as correct as possible and PJ wong is also an asset

Q: You just answer the question otherwise we will be here the whole day you know, just answer what is relevant. You said you have the forensic accountant to do the account and you rendered the account. Do you know this document? Forensic account report?

A: Yes it is in the affidavit.

Q: Can I refer you to page ...

A: 238

Q: this is the forensic report prepared by your accountant is it?

A: My forensic accountant before we had any legal recourse so we didn't took any legal recourse because as it is the asset in the administrator ...

Q: Miss Cynthia can you hold on.

A: I will always bound to do anything you know to be correct.

YA: Madam ...

C: All the administration.

YA: Madam wong ... Madam ...

C: Yes sorry,

YA: Listen to the question, you answer the question.

C: Okay.

YA: Let the lawyer ask the question, if not you will be here until the end of time. Mr Thangaraj continue ask her a question.

C: Sorry Yang Arif.

Q: Thank you My Lord. What is the name of the accountant?

A: Uma. But we did not use her at the moment because it was out of her capability, we just wanted to ...

Q: I only ask you about the accountant's name. Uma is it? U-M-A?

A: Yes, I think everybody is agreeable

Q: Miss Cynthia listen.

A: I think all the beneficiaries are agreeable.

YA: Madam ... if you continue like this I will have to make a finding that you are not telling the truth you know , you are not answering the question. Do you want me to make the finding?

C: No.

YA: So I am warning you the second time listen to the question, answer the question. He only asks you simple questions.

...

Q: I refer you to page 244, look at your claim here the last paragraph ... basically this report refers to the loss of revenue because the license of the Shell station license be cancelled by Shell, is that correct?

A: Yes.

Q: Here the estate claim is RM1,143,682.65. Is that correct?

A: This is agreeable by all beneficiaries.

Q: Miss Cynthia, I am not asking the beneficiaries is agreeable or not.

Answer the question.

A: Anyway by the way, I would like to refer you to ...

YA: Miss Cynthia, this is the third time I am warning you.

C: I am sorry YA.

...

Q: Ms Cynthia, can I put the question again. Based on what is said in paragraph 143, you agree that the civil suit that you filed in 2016 was dismissed by the High Court?

A: Yes, it was dismissed as in the ...

Q Ms Cynthia, that's —

A: We lost the license, is it, is that what you mean?

YA: Mr Thangaraj, it's ok, I will take notice of this.

...

Q: Miss Cynthia, you agree that during the matter pending in court of appeal, the Plaintiff requested you as the administrator to provide accounts in respect of the estate of Wong Poi Fong , there were letters written.

A: Which case sorry? Which case you are looking at? Is it 2006 or 2017? Or todays 2021? I am sorry I'm a bit confused.

Q: When the matter was pending in Court of Appeal ...

A: Which case please?

Q: I refer you to page 113

A: this is the second case right, 2017?

Q: Miss Cynthia, can you listen to the question? This letter was written to you, are you aware of this letter?

A: Definitely.

Q: You was asked to provide the accounts which you received as administrator.

A: This is the second case I took against her not she took against me.

Q: Can you listen to the question, look at this letter, are you aware of the content of this letter?

A: This case under 2004 case?

Q: Miss Cynthia ... this is the 4th time I've told you, dengar soalan, when he finish, answer.

Q: Do you agree you are the one who prepares this account? Do you agree the basis of the termination is basically due to the termination of the pekeliling services? And the license is subject Plaintiff's firm YW Global? Is that correct?

A: I do this because ...

Q: Miss Cynthia, can you answer my question?

A: This is an asset of the estate, so ...

YA: Miss Cynthia, this is my fifth time I ask you to listen to the question and answer.

C: But I don't agree with his ...

YA: If you don't agree just say you don't agree. Because the question is very simple

YA: In another word you sold the house to the third party since the third party purchased it so the money went to where?

A: Went to Pekeliling to offset the overdraft.

YA: This event occurred after the death? Isn't it?

A: This is after Pekeliling went into trouble.

YA: No, no. Answer the question. You have the habit of not answering the question Madam. The question is it occurred after his death, isn't it?

A: Yes correct.

YA: Okay. That is all I want to know.

[65] Another important factor that I have considered, is the failure of the defendant to provide the original documents sought by the plaintiff. The documents sought are:

(a) the original copy of the acknowledgment and agreement undated that were attached as exh CWYWM12; and

(b) original letter from the first defendant dated 11 December 2016 that was allegedly accepted by the plaintiff and exhibited as exh YWY24.

[66] The defendant contends that she needed time to seek the originals that were allegedly kept at her office and due to the difficulties posed by the MCO. However, after disclosing the existence of these documents in the defendant's affidavit affirmed on 6 July 2020 and retained by her at her storeroom or at her office, she now alleges that it was destroyed by thermites. This allegation only arose after the plaintiff wanted to have the said documents inspected by a handwriting expert.

[67] I find that the explanation given by the defendant is suspicious and indicate an intention to hide the true nature of the said document especially: (a) the original copy of the acknowledgment and agreement undated that were attached as exh CWYWM12; and (b) the original letter from the first defendant dated 11 December 2016 that was allegedly accepted by the plaintiff and exhibited as exh YWY24. This to me indicate, on a balance of probabilities that the said documents were fraudulently created by the defendant to justify her actions. I also find that she had created these documents as an attempt to persuade this court that the beneficiaries had agreed to what she had undertaken with the assets of the estate.

[68] My finding is also supported by the findings of Lim Yok Chaw as contained in the affidavit in encl 81. Lim Yok Chaw is the expert appointed by the plaintiff to consider and verify whether the documents identified earlier were genuine or otherwise. His finding indicates that there is 'high probability that the writer (plaintiff) of the specimen signatures did not write the disputed signature'. There is no evidence from the defendant to contradict this. The plaintiff herself denies ever agreeing or putting her signature to the imputed documents.

[69] Therefore, I find that the said documents were fictitiously created by the defendant. She had relied on them to support her contention that parties had agreed to all the expenses incurred by her.

Defendant's defences

Res judicata — These issues should have been raised in the earlier Originating Summons No WA-24NCVC-2004–11 of 2017

[70] The defendant contends that the plaintiff should have raised these issues before the court in the earlier originating summons. This is also based on the doctrine of res judicata as referred to earlier.

[71] However, I do not find that the said doctrine precludes the plaintiff from pursuing her claim to have the unlawful expenses to be returned by the defendant into the estate of the deceased. This is a separate and different cause of action available to the plaintiff. Furthermore, the plaintiff would only have known of these wrongs by the defendant after the accounts were shared by her pursuant to the order of court made in the aforesaid originating summons.

[72] Res judicata does not apply unless all the facts were the same, the same issues were raised and disposed of and all available evidence were available to the litigants in the earlier suit. I do not believe that this doctrine is applicable in this case. I refer to the decision of Lord Sumption in the UK Supreme Court's case of *Virgin Atlantic Airways Limited v Zodiac Seats* [2013] UKSC 46 where he stated:

> 17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example

to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494*, 504* (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. 'Issue estoppel' was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 at p 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181*, 197–198*. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, *which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.* Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.

In this case, it is obvious that the evidence of the wrongdoing was only disclosed subsequently by the defendant after the decision in the earlier suit. Therefore, the doctrine of res judicata in all of the guises suggested by Lord Sumption does not apply to the facts of this case.

The plaintiff is alleged to be approbating and reprobating by accepting the cash book

[73] The second argument put forward by the defendant's counsel concerns the allegation that the plaintiff is blowing hot and cold at the same time.

[74] The defendant contends that the plaintiff cannot on the one hand accept the validity of the cash book and at the same time challenge it. I find that this argument is misplaced. The plaintiff is not alleging that the cash book accounts as simply wrong but alleges that the said expenses as contained and recorded were not made in accordance with the terms of the will and not in accordance with the fiduciary duties owed by the defendant as the administrator.

[75] Therefore, I find that the plaintiff is entitled to challenge the expenses incurred by the defendant and whether they were made in accordance with the will and whether these expenses were made lawfully by the defendant.

[76] Note that the other issues raised by the defendant will be dealt with in the appropriate parts of this judgment hereinafter.

Issues 1, 3 and 4 — What are the amounts due to the plaintiff

[77] Given the above, I will now deal with the penultimate issue before me that has been unnecessarily convoluted by parties. I find that the penultimate issue is what is the amount that should be paid by the defendant, as the administrator, to the plaintiff.

[78] On this issue, I find it would be inappropriate to make such orders at this juncture as all of the evidence of the assets and the bona fide expenses of the estate are not before me. The plaintiff relies on O 80 of the Rules of the High Court 1980 to state that this court has the power to administer the estate and give directions as to the administration of the same.

[79] However, I am of the view that the orders sought by the plaintiff are beyond the scope of the powers of this court. It is not for this court to administer the estate. If the plaintiff is unhappy with the administrator and finds that the administrator had misused her powers, then the right position to undertake is to remove her in accordance with the provisions under the Rules of the High Court and under the Probate and Administration Act.

[80] Payments from assets of the estate must be undertaken in accordance with the terms of the will and law. The creditors must first be paid, and all lawful outgoings must be considered. This cannot be done as suggested by the plaintiff and should not be administered by court.

[81] I also note that that the defendant contends that there is a sum of RM444,100 that is allegedly due from PSSB to the estate. With due respect to counsel for the defendant, the claims for these sums even if they exist, lie solely against PSSB and not against the plaintiff. PSSB is a separate entity that should not be confused with the plaintiff. The issues concerning PSSB with the plaintiff have been fully dealt with in court in the aforesaid suits earlier between parties. I do believe that it would unlawful for this court to now reopen the same issues again as suggested by the defendant's counsel.

[82] Furthermore, if the defendant believes that the value of shares in PSSB should be paid by the plaintiff to the defendant for whatever reason, then I repeat this should have been raised in the earlier oppression suit. This claim was resolved in favor of the plaintiff and should not be reopened again. I find that the defendant continues her attempt to reopen litigation on issues that have been decided by the courts earlier. This also appears in the conduct of the defendant in administration of the estate.

[83] The issue concerning PJ (Wong) is also another red herring by the defendant to evade the reality of her failure to comply with her duties as the administrator of the estate. As I have found earlier, the current PJ (Wong) partnership is a new partnership that should not be confused with the earlier partnership that ceased upon the death of the deceased. Therefore, the estate has no claim to the proceeds from the new PJ (Wong) Partnership. This was even explained by the plaintiff during cross-examination when she explained that as on the death of the deceased, the shares in PJ (Wong) Partnership have been transferred to each of the beneficiaries.

[84] As I have said above, as of 15 October 2004, a new partnership was set up consisting of: (a) Lim Chin Beng, who remained a partner from the original partnership; (b) Wong Yee Mei @ Cynthia (defendant); (c) Yvonne Wong Yee Woon (plaintiff); and (d) Eric Wong Yee Leong. The beneficiaries had also been drawing each of their shares from the proceeds of the said partnership.

[85] In the circumstances, I find that the issues concerning PSSB and the PJ (Wong) are irrelevant for the purposes of these proceedings. I find that the defendant does not understand her duties as the administrator and believes that these entities should operate as if the deceased were still alive. This position is wrong and should be rectified.

[86] However, I do not find it appropriate for this court to decide as to the amount that should be paid to the defendant. This should be done based on a full investigation as to the: (a) assets of the estate; (b) debts of the estate; and (c) the amount that should be distributed to the beneficiaries based on the terms of the will. This should be undertaken by the defendant in accordance with the requirements of the law and under the terms of the will.

[87] Therefore, despite the existence of the cash book prepared and disclosed, I am of the opinion, that since there is lack of probity by the defendant, a further reconciliation of the estate accounts has to be taken before any order for payment is made. After it is only the cash book and not the full ledger of the estate that should laid down the assets, liabilities and eventual amounts that should then be distributed between the beneficiaries.

APPROPRIATE REMEDIES BASED ON THE CIRCUMSTANCES OF THIS CASE

[88] I find that the defendant acted as if the estate was under her own personal dominion and she was entitled to disregard decisions of the courts, the terms of the will and applicable law. I am of the opinion she has in fact acted contrary to her duties and this should be rectified in this suit. It is for the

purpose of rectifying the errors made by the defendant that I make the orders below.

[89] During the proceedings, the plaintiff did indicate to me at an early stage of the trial that they have chosen not to pursue prayer (1) in its originating summons. This is due to the procedural error by the plaintiff's solicitors not to file the necessary application under O 72 r 7 to cite the defendant to bring into and leave at the Registry the Grant of Probate. See *Siti Fatihah bt Diman & Ors v Diman bin Hassan & Ors* [2021] MLJU 2420; [2021] 1 LNS 2055.

[90] However, in view of the conduct of the defendant in the administration of the Estate and the need to finally determine the dispute between parties as well as the requirement to finally administer the estate in accordance with the terms of the will and law, I invoke my powers to remove the defendant as an administrator of the estate.

[91] I find that if she continues to administer the estate, it will remain unresolved, and parties will continue to biker and dispute until the end of time. Further litigation may ensue, and such a course of action is not in the best interest of the estate and the beneficiaries.

[92] I find that the conduct of the defendant as shown by the plaintiff in these proceedings by: (a) causing monies of the estate to be utilized without justification in law; (b) ignoring the rights of beneficiaries; and (c) ignoring orders made by our courts indicate to me an objectively sufficient cause to exercise my powers to remove the defendant as an administrator of the estate. It is the welfare and interests of the beneficiaries that are paramount, and I find that the defendant has put her personal feelings and opinion first in the administration of the estate. To me, the evidence adduced shows an objectively strong case or at the very least a reasonable suspicion that the affairs of the estate have not been administered appropriately in accordance with the law.

[93] My opinion above is guided by s 34 of the Probate and Administration Act 1959, s 40 of the Trustees Act 1949, which empowers this court with sufficient authority to remove and appoint a new administrator or administrator in the place of the defendant. I also refer to the test laid down to invoke such powers in *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177; [2002] 6 CLJ 152, *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81, *Re Khoo Boo Gong, Decd Khoo Teng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68; [1981] 1 LNS 78 and *Tan Kah Fatt & Anor v Tan Ying and another appeal* [2021] MLJU 284; [2021] 1 LNS 264.

[94] I quote the judgment of the Court of Appeal in *Tan Kah Fatt & Anor v*

Tan Ying and another appeal [2021] MLJU 284; [2021] 1 LNS 264, where it is reported:

> [62] In determining whether Tan Kah Fatt has discharged his duty as an administrator responsibly, Counsel for Tan Ying submitted the learned JC was correct in ordering the removal of Tan Kah Fatt by referring to the case of *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 17; [2002] 6 CLJ 152, particularly to p 183 C-D as follows:
>
> > Learned counsel had argued, and I accept, that applying the objective test, all that is needed is for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or *a conflict of interest situation* or inability to act to invoke this court's jurisdiction under *s 34 of the PAA* and allow the reliefs sought. The allegations for consideration are thus, a question of facts to be determined by this court on an objective test.
> >
> > It is immaterial therefore, if the allegations are actually believed or not, so long as it can be objective determined that they raised a reasonable suspicion, then the plaintiff would have succeeded. (Emphasis added.)
>
> [63] In *Ligar Fernandez*, the plaintiff sought 2 reliefs: to revoke the grant of probate to the defendant and to remove the defendant's appointment as the administrator and trustee of the estate of the deceased. The first relief which the plaintiff sought was under s 34 of the *Probate and Administration Act 1959* ('the PAA') which states:
>
> > Any probate or letters of administration may be revoked or amended for any sufficient cause.
>
> In this instant appeal, it is an undisputed fact that Tan Kah Fatt and Tan Ying are appointed co-administrators pursuant to the LA and Tan Ying is seeking to remove Tan Kah Fatt as administrator.
>
> [64] We are of the considered opinion that the learned JC was correct in adopting the approach taken by the High Court in Ligar Fernandez as encapsulated in the passage reproduced in para 62 above. The High Court in Ligar Fernandez did so after taking into account that the Court of Appeal in *Damayanti Kantilal Doshi & Ors v Jigarlal Katilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81 had followed the test applied by the Federal Court in the case of *Re Khoo Boo Gong, decd Khoo Theng Seong v Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68; [1981] 1 LNS 78. The High Court in *Ligar Fernandez* held that the phrase 'sufficient cause' has not been defined but the test is an objective test whereby the consideration of the welfare and interests of the beneficiaries of an estate is the paramount criterion in deciding whether there is sufficient cause to interfere.
>
> [65] We observed that the learned JC after taking cognisance that a conflict of interest situation constituted a ground for the removal of an administrator thereafter analysed whether there was sufficient evidence to raise a strong or reasonable suspicion of such a conflict. At para 44 of the grounds, the learned JC stated that: 'Tan Kah Fatt in Suit-1 as the co-administrator of the estate of the deceased and also sitting as a director of the said companies had given his consent for the plaintiffs in Suit-2 to proceed against the estate of the deceased which clearly supports the contention by Tan Ying in Suit-1 that Tan Kah Fatt is in a positon of

A conflict and ought to be removed immediately'.

[95] Applying the above test, I find sufficient cause to remove the defendant from her position as the administrator of the estate.

B ORDERS OF THIS COURT

[96] Given the above, I make the following orders:

(a) the defendant is removed from her position as the administrator of the C estate and that Amanah Raya Bhd is appointed as an administer of the estate with the will annexed and the costs of the said administration will be borne from the assets of the estate;

(b) the defendant is directed to produce and surrender all documents relating to the administration of the estate of the deceased to Amanah Raya Bhd; D

(c) the defendant is directed to pay the sums of RM2,161,162.41 in her personal capacity to the estate of the deceased;

(d) the plaintiff is given liberty to apply for any further orders thereafter if the above orders are not complied with; and E

(e) costs of RM30,000 to be paid by the defendant personally to the plaintiff.

Order accordingly.

F Reported by Ashok Kumar

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H

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